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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 541

WILLIAM AHEARN, ET AL.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

CLAUDE L. DAWSON
1049 Shoreham Building
15th & H Streets, N.W.
Washington, D. C.

KEITH L. SEEGMILLER
IRVING WILNER
1725 Eye Street, N.W.
Washington 6, D. C.

Attorneys for Petitioners

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Claims dismissing the petition therein.

OPINION BELOW

The Court of Claims rendered two opinions in the above entitled cause. The first is officially reported in Volume 142 C. Cls. 309, and is printed as Appendix A hereto. The second opinion is not officially reported. It is printed as Appendix B hereto.

JURISDICTION

The final judgment of the United States Court of Claims (Appendix B, infra p. 14) was entered October 5, 1960. The jurisdiction of the Court below was founded on 28

U.S.C. 1491 (1958 Ed.). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1255 (1) (1958 Ed.).

QUESTIONS PRESENTED

This case is a sequel, in respect of controlling legal questions, to the cases of *Armour* v. *Wantock*, 323 U.S. 126, and *Skidmore, et al.* v. *Swift and Company*, 323 U.S. 134. These questions relate in the main to the compensability of standby periods of enforced idleness spent by civilian personnel employed by the United States Government as fire fighters under circumstances where it is impossible for the employees to utilize such periods for their own purposes. The questions arise out of circumstances substantially identical to those dealt with by the Department of Labor under the Fair Labor Standards Act and the Walsh-Healey and a Public Contracts Act, and considered by this Court in the *Armour and Skidmore cases, supra.*

Specifically, the questions presented by this case are:

1. Is firmly-established administrative practice under the Fair Labor Standards Act of 1938, according to which an employee on a 24-hour tour of duty must be compensated for the full 24 hours if, during such tour, he got less than 5 hours consecutive sleep, applicable, as a source of law or competent expression of public policy, to a determination of what constitute "Hours of Employment" in the Federal Employees Pay Act of 1945?

2. Is long-established practice under the Fair Labor Standards Act of 1938, which forbids averaging of hours over two or more weeks, for the purpose of determining "Hours of Employment" for minimum wage and overtime pay purposes, relevant to similar determinations pursuant to the Federal Employees Pay Act of 1945?

3. Where firefighters at the Newport Naval Base are employed on 24-hour tours of duty with the time in each

tour divided by express provision of regulation (B. infra p. 8) into three equal parts of eight hours for work, eight hours for standby time and eight hours for sleeping, and where it is undisputed that the firefighters are entitled to be compensated for the full eight hours of work, and the full eight hours of standby time as well as for work performed during the sleeping period, may the Naval Authorities, in violation of their regulation, by the mere method of extending the time for sleeping from eight to ten hours per tour of duty, create a setoff against the time worked during the sleeping period by charging the additional time for sleeping against the hours worked during the sleeping period?

4. Under the Federal Employees Pay Act of 1945 providing for additional compensation to be paid for "all hours of employment" in excess of 40 hours per week, is it competent for the Department of the Navy to refuse to pay petitioners working three 24-hour tours of duty per week for such time occurring between active duty assignments during the night, in a given work-week, on the ground that additional hours, in excess of eight hours per night, were allowed for sleep purposes in some *other* work-weeks, months, or even years earlier or later?

5. Is the term "duty" in Section 301 of the Federal Employees Pay Act of 1945 providing for night time differential pay at the rate of 10% to any eligible employee "who is assigned to a regularly scheduled tour of duty any part of which . . . . . falls between 6:00 p.m. and 6:00 a.m. . . . " limited to actual labor, or does it include standby time as well?

STATUTES INVOLVED

Section 201 of the Federal Employees Pay Act of 1945, 59 Stat 295, 5 U.S.C. 911 provides:

> "Officers and employees to whom this title applies *shall*, in addition to their basic compensation, be compensated for *all hours of employment*, officially or-

dered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows: * * *" (italics supplied)

Section 301 of the above Act, 5 U.S.C. § 921, provides:

"Any officer or employee to whom this title applies who is assigned to a regularly scheduled *tour of duty*, any part of which, including overtime falls between the hours of 6 o'clock p. m. and 6 o'clock a. m., *shall* for *duty* between such hours . . . be paid compensation at a rate of 10 percentum in excess of his basic rate of compensation for duty between other hours . . ." (italics supplied)

STATEMENT OF THE CASE

Petitioners sued in the Court below to recover additional compensation for overtime work performed by them as civilian firefighters in the employ of the United States Navy at the Newport, Rhode Island, Navy Station. By stipulation of the parties, approved by the Court, the initial trial in the Court below was limited to the issues of law and facts relating to the right of the plaintiffs to recover. This trial was terminated by the Court's decision on May 7, 1958 that plaintiffs are entitled to recover. The case was then remanded for further proceedings pursuant to Rule 38(c) of the Court of Claims for determination of the amounts due plaintiffs, if any, after appropriate off-sets. This phase of the litigation was terminated by the decision of October 5, 1960 dismissing plaintiffs' petitions and dismissing defendant's counter-claims. Both decisions rested on Findings of Fact. For the purpose of convenience, reference to the Court's Findings in support of its earlier decision in 1958 will be by the symbol "F."; reference to the Court's Findings in support of its decision of October 5, 1960 will be by the symbol "FF.".

For various periods since September 1, 1949, petitioners were employed by the defendant as firefighters at the United States Naval Station at Newport, Rhode Island.

They instituted proceedings in the United States Court of Claims to recover overtime compensation for the respective periods of their employment pursuant to the provisions of Section 201 of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, and extra night pay differential pursuant to the provisions of Section 301 of that statute. The claims of petitioners for additional compensation are limited to *specified* tours of duty within particular work-weeks during which, because of performance of actual work or because of unusual conditions making sleep impossible, they were deprived of 7 hours sleep. They make no claim for any other tours of duty during which they did have a minimum of 8 hours for eating and sleeping.

Since September 1, 1949, each of the petitioners has had a work-week consisting of 72 hours divided into 3 shifts of 24 hours each, commencing at 8:00 a.m. and continuing to 8:00 a.m. the next day. Throughout this period they were paid on the basis of 16 hours out of each 24 hours constituting a tour of duty, the remaining 8 hours being considered sleeping and eating time and not compensable. Thus, petitioners were paid for 48 hours per week, the 8 hours in excess of the 40-hour work week having been paid for as overtime. Since May 28, 1953 petitioners were paid under the so-called two-thirds rule pursuant to which each hour on duty is regarded as equivalent to two-thirds of an hour of working time for pay purposes. Night differential compensation has likewise been allowed under the two-thirds rule (F. 6, 16, 18).

Separate dormitories were provided for eating and sleeping at each of the 8 stations on the base except two, where only one or two men were on duty and they were required to sleep in the fire station office. At no time within the period covered by this litigation were plaintiffs free to determine their periods of sleep. During the period from September 1, 1949 until August 21, 1951,

petitioners were not permitted to occupy their beds from 6:00 a.m. to 10:00 p.m. Thereafter they were forbidden to sleep from 6:00 a.m. to 10:00 p.m. (FF. 16).

By its decisions, the Court below found that approximately one hour of each tour of duty was utilized for eating purposes (FF. 14).

During a typical 24-hour shift petitioners would report to work at 8:00 o'clock in the morning. They would attend to routine chores such as inspection of apparatus and supplies; cleaning of equipment and premises; building inspection; patrols; drills and miscellaneous other duties outlined by the Court in detail in its Findings (F. 11). A desk watch was maintained on a 24-hour-a-day basis. This was rotated on two-hour shifts among the 5 or 6 men assigned to a station. Each man had at least one of these 2-hour watches between the hours of 10:00 p.m. and 6:00 a.m. of each tour of duty. "After 6:30 p.m. if there was nothing special to do, such as an area patrol, a special watch or other special duty, they would relax, watch television or listen to the radio until about 10:00 o'clock p.m. (prior to August 21, 1951, or 8:00 p.m. subsequent to August 21, 1951), when they were allowed to 'turn in to bed' until 6:00 o'clock the next morning, subject every night, however, to being called for a two-hour desk watch and subject further to being called any time for fires or other emergencies. *They were able to get a maximum of 8 hours sleep and rest combined each night if there was nothing else to do.* Often the actual amount of sleep would be from 5 to 7 hours or less. On very rare occasions some of the men got practically no sleep from 10:00 p.m. to 6:00 a.m." (F. 9). (emphasis ours)

Pursuant to a system of rotation in effect at the Base, the petitioners were moved from station to station periodically so that in actual practice each one has served at each of the several stations. In the main, the duties were

similar at the several stations (F. 10). A special type of duty was required at the central fire alarm station. This is described in F. 13 as follows:

> "After reporting to work at 8 a.m. there would be an 8-hour tour of building inspection concluded at 4 o'clock p.m. This would be followed by a 3-hour watch on the alarm board until 9 p.m. Between 8 a.m. and 9 p.m. relief was granted for a noonday meal and an evening meal. At 9 p.m. such time as was necessary for writing up the day's reports of building inspections would be utilized. After these reports were completed, it was permissible to go to bed. At 1 a.m. there would be another 3-hour duty on the alarm board until 4 a.m. Thereafter, sleep was permitted until 6 o'clock a.m. and the period from 6 until 8 o'clock a.m. could be used for dressing, washing, shaving, making up the beds and getting breakfast. This type of day could result in as little as 4 hours sleep. During this tour each of the three men would also be subject to call for fires or other emergencies except during the 8-hour period which each one had at the alarm board. *The sleeping conditions at the central fire alarm station were not good because of the large number of phone calls and alarms which came in and because the sleeping quarters were within easy hearing distance of the central alarm board . . .*" (italics supplied)

Petitioner, Arthur F. St. Laurent, one of the two plaintiffs to whom the second trial was confined by agreement of the parties and with the consent of the Court, as typical of the entire group of plaintiffs, was on duty at this station for approximately 16 months, from July 15, 1953 to November 6, 1954. During his assignment, this petitioner performed *actual duty* averaging 3.38 hours from 8:00 p.m. to 10:00 p.m. and an average of 12.11 hours per bi-weekly period from 10:00 p.m. to 6:00 a.m. (FF. 4).

One of the Findings having general significance is:

> "*During all of the 72 hours comprised within the work week, plaintiffs were required to remain at their*

posts in the performance of active duties or on a standby basis." (F. 16) (emphasis supplied)

The Court also found (F. 15, 19), that during the period here in question there was a regulation applicable to the plaintiffs stating:

> "When an employee is placed in a standby status he is placed in a duty status which, under decisions of the Supreme Court (323 U.S. 126), is subject to compensation. As here used, 'standby status' and 'standby duty' are synonamous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."

Describing the no-work periods of petitioners the Court below states in F. 7:

> "The record does not establish with accuracy the average time available for relaxation, but it appears to have been approximately 6 to 8 hours a day, although during such periods *they were still at the station and in a standby status* insofar as any emergency calls were concerned." (emphasis supplied)

The system of compensation applicable to plaintiffs from September 1, 1949 to May 28, 1953 divided each 24-hour tour of duty into 3 equal parts, one work time, one standby time and one eating and sleeping time. The first two were treated as working time, but the third was not. During this period there was in effect a Navy regulation stating:

> "Where employees are on a 24-hour-on, 24-hour-off system, 8 hours of *each* 24-hour-on shift *shall* be allowed for meals and sleeping." (F. 17) (emphasis supplied)

Following May 28, 1953, the so-called two-thirds rule was put into effect. According to this system, two-thirds of each hour of the 24-hour period, or 16 hours, was credited as pay time, and one-third of each hour of the 24-hour period, or 8 hours, was charged as sleeping and

eating time. The applicable regulation required that pay be credited for "16 hours of work and standby time". (F. 18) This regulation specified that no payment was to be made for work done during the 8 hours set aside for eating or sleeping. However, while assigning a theoretical value, for pay purposes, of only 2/3 to each hour of duty, the regulations forbidding sleeping except during specified nighttime hours (FF. 16) remained undisturbed and unmodified.

In addition to claiming compensation for actual labor performed during sleeping time, petitioners also claimed compensation for periods of 2 hours or less during which no work was performed but which immediately preceded scheduled activity, or which occurred between scheduled work periods, or which immediately followed nighttime activity, as one unusable for sleep. The Court below recognized the existence of a factual basis for the claim, but refused to grant judgment for such time periods as were specifically identified, for the reason that the "excess in pay, if any, which may be due plaintiffs, *over and above the defendant's counter-claim*, is negligible". (emphasis supplied)

Petitioners also claimed additional compensation for entire night periods, as for continuous service, for those specifically-identified nights when active duty prevented them from obtaining a minimum of 5 hours uninterrupted sleep. In support of their contention, petitioners invoked the decision in Farley v. United States, 131 C. Cls. 776, and a regulation of the Department of Labor, implementing the Fair Labor Standards Act, 29 C.F.R. App. Section 785.3(e), reading in part, as follows:

> "(2) • • • (i) Where an employee is required to be on duty for 24 hours or more the employer and employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours worked provided ade-

quate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If the sleeping period is interrupted by a call to duty the interruption must be counted as hours worked.

"(ii) If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the employee cannot get at least five hours' sleep during the scheduled period the entire time is working time."

The existence of a factual basis for this claim was recognized in Finding 20 of the Commissioner's report filed November 6, 1959, which, however, concluded that the above quoted regulation is not applicable in the premises for the reason that the Fair Labor Standards Act specifically excludes the United States as an employer. The Court below failed to make any Finding concerning this regulation.

During the period in question there was in existence the following Navy Personnel Regulation, N.C.P.I. 85. 21.d., December 3, 1953, expressly recognizing the applicability of federal labor law to the Pay Policies of the Navy Department:

"d. Federal Labor Laws. Labor and executive orders relating to employees of the Department of Defense are binding upon the Navy. *Federal laws relating to labor generally and regulations written thereunder* by the Department of Labor are, when applicable, followed by the Navy." (emphasis ours)

On the basis of the Findings embodied in the Tables forming part of FF. 18, the Court below determined (first paragraph, page 3, Slip opinion, October 5, 1960) that plaintiff McKay had spent a total, over the 9-year period, of 2,510 hours of duty during his sleeping period,

and St. Laurent, 2,233 hours, and that "*For this they are entitled to compensation*". (emphasis supplied) Plaintiffs' petitions were dismissed, however, for the reason that "they had been paid compensation for hours *allotted* to sleeping and eating amounting to 3,750 hours, in the case of McKay, and to 3,752 hours, in the case of St. Laurent". (emphasis supplied) These offsetting figures of 3,750 and 3,752 hours, respectively, comprise *all* of the hours, in excess of 7 hours per night, during which petitioners were permitted to sleep during the *9-year period* covered by the claim, regardless of whether this time was, in fact, used for sleep, or whether petitioners desired this excess time for sleep.

Petitioners contend that this action by the Court below is erroneous as being contrary to law.

REASONS FOR GRANTING THE WRIT

The petitioners assert that this application for a Writ of Certiorari is made in accordance with Subdivision (b) of paragraph (1) of Rule 19 of this Court in that the United States Court of Claims has decided an important question of Federal Law which has not been, but should be, settled by this Court.

The basic issue presented by the facts of this case is whether in the case of federal civilian employees whose administrative work week consists of 3 24-hour tours of duty, or a total of 72 hours, per week, and who are paid for only 48 hours on the assumption that, according to Regulations, the remaining 24 hours, or 8 hours per tour of duty, are spent by them for eating and sleeping, may be ordered to work during *some* sleep periods, without compensation therefor, on the grounds that during *other* nights in *different* administrative work weeks, months or even years preceding or following the event, during the span of their employment, they were

"allowed" to sleep as long as 9 or 10 hours per tour of duty.

This question is of vital concern to thousands of U. S. civilian employees whose compensation is governed by the Federal Employees Pay Act of 1945, many employees subject to the provisions of the Walsh-Healey Public Contracts Act, 41 U.S.C. paragraph 35 et seq., and great numbers of employees regulated by the provisions of the Fair Labor Standards Act of 1938.

A. The Court's Decision Improperly Construed And Applied Sections 201 And 301 Of The 1945 Pay Act.

The Court of Claims through its decision in the instant case took the position that 18 or more hours of work and active standby may be legally exacted from an employee on a 24-hour daily, and 72-hour weekly, shift of duty with payment for only 16 hours, provided that on the *average*, considering the years of employment *in their totality*, the employee has had 8 hours per shift, or 24 hours per administrative work week, for eating and sleeping. Thus, at page 2 of its opinion (Appendix No. A)

> "We have never said that an employer was required to provide any specified amount of time for these purposes; all that we have said was, *whatever* the time fixed for eating and sleeping, an employee is not entitled to compensation for the time so spent. We have approved a division of the 24 hours into 3 equal parts, 8 hours work time, 8 hours standby time, and 8 hours for eating and sleeping, but we have never said such a division was required.
>
> "The Civil Service Commission issued a regulation approving such a division of the 24 hours, and this has been followed by regulations in a number of departments; but, we repeat, *all we have said is that an employee was not entitled to compensation for sleeping and eating time.* We have never said he should be allotted 8 hours for sleeping and eating,

no more and no less, and we say again that an employee is not entitled to compensation for the time allotted to him to eat and sleep." (italics supplied)

This view of the law should be reviewed for the following reasons:

1. The Court found, (F. 17), that prior to May 28, 1953, applicable Navy Regulations were to the effect that "where employees are on a 24-hour-on, 24-hour-off system, 8 hours of *each* 24-hour-on shift *shall* be allowed for meals and sleeping". (emphasis supplied) In view of the expressed language of this regulation, there is no basis for arguing that the government discharges its duty by an indiscriminate "averaging" of time for eating and sleeping, or that the deficit of sleep during one tour of duty may be balanced off against a surplus of time "allowed" for sleep during a different tour of duty, however remote in time. The regulation unequivocally demands that 8 hours for eating and sleeping must be allowed during *each* tour of duty.

2. The Court found, (F. 18), that following May 28, 1953, the applicable regulation was to the effect that "when the 24-hour-on duty period is scheduled as a single work day, the work day may be divided into 'work time', 'standby time', and 'sleeping and eating time', and pay credited for 16 hours of work and standby time. No pay is creditable for 'sleeping and eating time' even though active work may be performed during the hours devoted to sleeping and eating". Even allowing for the correctness of applying the two-thirds rule, in situations predicated upon a legal possibility of an employee taking sleep whenever employment conditions permit it, anytime within the confines of a 24-hour tour of duty, it cannot be applied in the instant case, where the Court found, (FF. 16), that during the period from September 1, 1949 until August 21, 1951 plaintiffs *were not permitted* to occupy

their beds from 6 a.m. to 10 p.m. and that thereafter, they *were not permitted* to do so from 6 a.m. to 8 p.m.

3. The Court also found, (F. 17), another Navy Regulation applicable in the premises to the effect that "(2) pay is computed on a weekly basis, *not on the basis of the average weekly hours over a cycle* (25 Comp. Gen. 205; B-51619 of 20 August 1945)" (emphasis supplied).

Finding 19 recites:

> "4-4. Standby Duty.—When an employee is placed in a standby status he is placed in a duty status which, under decisions of the Supreme Court . . ., is subject to compensation. As here used, 'standby status' and 'standby duty' are synonamous. Both mean 'work' for pay purposes, whether the employee sleeps or idles away his time while awaiting a call to perform actual work."

The hereinabove quoted language from regulations not only characterizes standby duty as work, but specifically declares that the mere permissiveness of sleep during standby will not vitiate its basic characteristic. This, together with the prohibition of computing pay based upon an average "over a cycle" seems to preclude the offsetting decreed by the Court below.

4. The Court of Claims specifically found, (F. 16), that "during all of the 72 hours comprised within the work week, plaintiffs were required to remain at their posts in the performance of active duties or on a standby basis".

The cited regulations and findings make it clear that the total hours of duty with the exception of 8 hours reserved for eating and sleeping are compensable in an absolute sense and that, furthermore, the 8 hours which are carved out from the tour of duty for compensation purposes must relate to a *specific* tour of duty and cannot, therefore, be substituted for by a comparable period

in a different tour of duty. Indeed, the reason why 8 hours out of 24 on duty are exempted from the requirements of payment is, as stated by this Court in *Skidmore, et al* v. *Swift & Co.*, 323 U.S. 134, at p. 139:

> "Although the employees were required to remain on the premises during the *entire time*, the evidence shows that they were very rarely interrupted in their normal eating and sleeping time and these are pursuits of a purely private nature which would presumably occupy the employees time whether they were on duty or not and which apparently could be pursued *adequately* and *comfortably* in the required circumstances; *the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways that men would have chosen had they been free to do so.*" (italics ours)

There is nothing in the evidence or the Findings in the instant case even tending to suggest that plaintiffs would have chosen to sleep 10 hours in any one 24-hour period if they had the freedom to choose.

B. The Decision Herein Is Reviewable As Repugnant To Well-Established Administrative Practice Under The Fair Labor Standards Act.

At the trial, plaintiffs introduced in evidence U.S. Department of Labor Interpretative Bulletin, Part 785, December 1955, according to which a sleeping period so interrupted that the employee cannot get a reasonable night's sleep, the *entire* period must be counted as work. The above regulation further provides in substance that if the employee cannot get at least 5 hours uninterrupted sleep during the scheduled period, he is not deemed to have had a reasonable night's sleep. This regulation is set forth in Commissioner's Finding No. 20 (R. 62). The Commissioner failed to include in said Finding an explanatory statement from the Administrator, Wage and Hour and Contracts Division, also in evidence, (Appendix

No. "C"), or the stipulation of counsel that the Administrator, if called as a witness, would have testified in accordance with that statement, as requested in plaintiffs' proposed Finding No. 11. The evidentiary importance of the Administrator's statement lies in its unqualified assertions that: (1) the minimum of 5 hours' sleep must be *uninterrupted*; (2) That the Regulation was based on *practical considerations*; (3) That the enforcement position has been in effect for *many years*; (4) That this position constitutes the *official position* of the Wage, Hour and Public Contracts Divisions of the Department of Labor insofar as the *administrative and enforcement responsibilities* under the Fair Labor Standards Act are concerned and, (5) That the position outlined has been *consistently* applied in all types of installations where employees such as *firemen* are required to be on duty for 24 hours or more. As previously indicated, the Court below failed to make any Finding whatever concerning the practice under the Fair Labor Standards Act.

The Court has obviously taken the position that the Regulation and practice of the Department of Labor under the Fair Labor Standards Act (29 U.S.C. 201, et seq.) are irrelevant in the premises because the Act "specifically excludes the United States as an employer". Such position is at odds with the fact that the Court of Claims itself has cited and relied upon the decisions of this Court in *Armour* v. *Wantock*, 323 U.S. 126, and *Skidmore* v. *Swift and Company*, 323 U.S. 134, decided under the Fair Labor Practices Act, in 3 recent opinions involving the application of the 1945 Pay Act.[1] In the *Armstrong* opinion, the Court below, referring to the *Armour* and *Skidmore* cases, said: "They arose under the Fair Labor Act, but this Act, as also the Federal Employees Pay Act,

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[1] *Farley* v. *United States* 131 Ct. Cl. 776 (1955); *Gaetke* v. *United States*, 136 Ct. Cl. 756; *Armstrong* v. *United States*, No. 145-56 (decided January 14, 1959).

required overtime pay for 'employment' beyond a certain number of hours . . ."[2]

A Navy Civilian Personnel Regulation, N.C.P.I. 85.21.d., December 3, 1953, (R. ---), expressly recognizes the application of Federal labor law to the pay policies of the Navy Department:

> "d. Federal Labor Laws. ~~Labor~~ LAWS and executive orders relating to employees of the Department of Defense are binding upon the Navy. *Federal laws relating to labor generally and regulations written thereunder* by the Department of Labor are, when applicable, followed by the Navy." (emphasis ours)

In the exercise of its responsibilities of enforcing the Wage and Hour provisions of the Fair Labor Standards Act, the Department of Labor has long adhered to a position diametrically opposed to that of the Court below. This position finds expression in the following Regulation:[3]

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[2] At pp. 139-40 of the Skidmore opinion, this Court said the following concerning the measure of authority of administrative rulings of the U. S. Department of Labor:

> "They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a District Court's processes as an authoritative pronouncement of a higher Court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a Judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. This Court has long given consideration and in some cases decisive weight to Treasury decisions and to interpretive regulations of the Treasury and of other bodies that were not of advisory origin.
>
> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the Courts by reason of their authority, do constitute a body of experience and informed judgment to which Courts and litigants may properly resort for guidance . . ."

[3] W and H Interpretive Bulletin 29 CFR Section 778.2(d).

> "The Act takes a single work week as its standard, and *does not permit averaging* of hours over two or more weeks. This is true regardless of whether the employee works on a standard or swing shift schedule and regardless of whether he is paid on a daily, weekly, bi-weekly, monthly, or other basis." (emphasis supplied)

In a policy-statement letter by the Administrator, Wage and Hour and Public Contracts Divisions, U. S. Department of Labor, (Appendix No. "D"), it is stated.

> "It is not permissible to offset sleeping time from one tour of duty to another since no more than 8 hours of sleeping time in a given tour can be excluded from hours worked."

The cases of *Overnight Motor Company* v. *Missel*, 316 U.S. 572, and *Walling* v. *Helmerich and Payne*, 323 U.S. 37, are in harmony with this position. See also, *Black* v. *Roland Electrical Company*, 163 F. 2nd 417, wherein it was decided that where the employer's practice of paying time and a half for hours worked before or after normal hours on any given day regardless of the total hours worked in a week, resulted in some payment during some weeks exceeding the statutory requirements, the employer could not claim such overpayment in one week as a credit against payments in other weeks which did not equal statutory requirements.

Failure by the Court of Claims to give effect to the policy evolved by the Department of Labor and sanctioned by this, and lower federal Courts under the Fair Labor Standards Act, in the field of labor relations concerned with pay under the 1945 Pay Act, creates disharmony among related branches of federal jurisprudence which are in pari materia, and in compelling analogy.

The legislative history of the 1945 Pay Act unmistakenly shows its intrinsic relationship to the broad considerations of policy which motivated the labor reform enactments by Congress in the early and middle Thirties.

The Findings of the Court of Claims in *Anderson* v. *U.S.*, 136 Ct. Cl. 365, trace the origin of the 40-hour week in the 1945 Pay Act to the industrial conditions under the National Industrial Recovery Act of 1933. See, also, H.R. 726, 79th Congress, 1st Session, concerning the Federal Employees Pay Act of 1945, pointing out the desirability of conforming the employment practices of the United States to the Little Steel formula.

The unsettling climate created by the decision of the Court of Claims in the instant case is bound to have repercussions extending beyond the thousands of federal civilian employees directly affected. Because of the intimate relationship in social philosophy and almost identical legislative draftsmanship and, particularly, due to the precedents established by this Court in the cases of *Armour* v. *Wantock*, 323 U.S. 126, and *Skidmore, et al* v. *Swift and Company*, supra, matters touching practical application of such considerations as "Hours of Employment", "Standby Time", and the like, in one area of federal employee relationships is more than likely to permeate the sensitive interests of millions of wage earners in other areas subject to the exertion of federal power through the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. Section 201-219, the Walsh-Healey Public Contracts Act of 1936, 49 Stat. 2036, as amended, 41 U.S.C., Section 35, and cognate legislation. One ground of real apprehension engendered by the decision in the instant case lies in that it opens the door to grossly expanded tours of duty and administrative work weeks without corresponding increases in compensation. If, as was expressly decided by the Court below, it is permissible to set up a 72-hour work week in duty status with payment only for hours of actual work on the pretext that the remainder of the time is "allowed" for eating and sleeping, no reason appears why a hundred-hour work week may not be established with payment only for a small fraction thereof spent in actual work.

Petitioners earnestly contend that the decision of the Court below is contrary to sound judicial and administrative principles long established in the premises, and that the issue raised thereby is one of vital, public importance meriting an authoritative opinion by this Court.

CONCLUSION

For the reasons and authorities hereinabove referred to, petitioners pray that a Writ of Certiorari be granted.

Respectfully submitted,

CLAUDE L. DAWSON
1049 Shoreham Building
15th & H Streets, N.W.
Washington, D. C.

KEITH L. SEEGMILLER
IRVING WILNER
1725 Eye Street, N.W.
Washington 6, D. C.

Attorneys for Petitioners

APPENDIX "A"

IN THE UNITED STATES COURT OF CLAIMS

No. 332-55

(Decided May 7, 1958)

WILLIAM AHEARN, ET AL. v. THE UNITED STATES

Mr. Keith L. Seegmiller for plaintiffs. *Mr. Claude L. Dawson* was on the briefs.

Mr. Kendall M. Barnes, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for defendant. *Mr. Thomas J. Lydon* was on the brief.

OPINION

WHITAKER, *Judge,* delivered the opinion of the court:

Plaintiffs sue for overtime and night differential pay alleged to be due them for services as firefighters at the United States Naval Base, Newport, Rhode Island. Their claims are based upon sections 201 and 301 of the Federal Employees Pay Act of 1945, as amended, 59 Stat. 295. The claims of plaintiffs herein, one hundred and eleven in number, except for travel pay, are similar, in both law and fact, to those of other firefighters recently considered by this court in *Avary, et al.* v. *United States,* C. Cls. No. 266-56, decided March 5, 1958, and *Collins* v. *United States,* C. Cls. No. 141-56, decided March 5, 1958.

The trial herein was limited by stipulation to the question of liability, with the amount of any recovery to be determined by further proceedings pursuant to Rule 38 (c).

Plaintiffs first claimed entitlement to pay for all time spent in eating and sleeping, while on tours of duty at their fire stations, but, at oral argument they abandoned these claims in the light of the *Avary* and *Collins* cases, *supra*. Remaining for consideration are plaintiffs' contentions that they are entitled to compensation for work actually performed during time set aside for sleeping and eating, and for time spent in travel by boat to two fire stations located on islands offshore from the base proper.

During the period of the present claims, plaintiffs have been on duty for a total of 72 hours per week. Each of the three weekly 24-hour tours, comprising the 72 hours, is divided into three parts, by the regulations under which they were paid: 8 hours in a work status; 8 hours in a standby status; and 8 hours for sleeping and eating. For the first 40 hours in a work and standby status, they were paid regular rates of pay, and for the last 8 hours they were paid at overtime rates.

Prior to May 23, 1953, they were paid at overtime rates for some specific types of work performed during sleeping time, but otherwise received no pay for hours set aside for sleep. It cannot be determined from the record what specific work performed during sleeping and eating time, prior to May 23, 1953, was paid for and what was not. Thereafter, they received pay for two-thirds of the total time spent at their duty stations, with no extra pay for duties performed during sleeping time. Up to May 1953 a night differential of 10 percent of basic compensation for all hours of employment between 6:00 p. m. and 6:00 a. m. was received by plaintiffs for all of such time except that set aside for sleeping from 10:00 p. m. to 6:00 a. m., but thereafter they received differential pay for two-thirds of such hours, whether sleeping or not.

The change in the method of compensation resulted from a change in the regulation of the Department of the Navy.

to conform to the "two-thirds rule" for compensation of employees whose duties were irregular in time, which had previously been promulgated by the Civil Service Commission. This rule provided for pay for two-thirds of the time on duty, on the theory that the other one-third was consumed in sleeping and eating.

The nature of the duties performed by plaintiffs during hours set aside for sleeping are set forth in detail in our findings of fact. They include claims for two hours' per man per tour of duty on alarm desk duty, and other miscellaneous things, such as, standing by at movies and dances on the base, removal of snow from in front of the fire houses, standing by while tankers discharged cargo, patrols, etc.

What we have said in *Avary, et al.* v. *United States, supra,* and *Collins* v. *United States, supra,* decided the same day, is dispositive of the primary claims herein. In those cases we held that time spent in sleeping and eating is noncompensable, but that time spent in actual labor during these periods is compensable under sections 201 and 301 of the *Federal Employees Pay Act, supra.* To the extent that plaintiffs have not been compensated for work actually performed during periods set aside for eating and sleeping they are entitled to recover.

Approximately one hour of each tour was consumed in eating.[1] In addition, plaintiffs were paid night differential for two-thirds of all applicable hours after the 1953 change in regulations. Prior thereto, they had not been paid during time set aside for sleep. For ten hours out of each 24-hour tour plaintiffs were permitted to sleep, except for the period from December 1950 to August 1951, when only 8 hours were allowed. Since, under section 301 of the

[1] Plaintiffs prepared their own food at facilities provided for them, or ate at military messes available on the base.

Act, night differential is payable only for hours of "duty",[2] plaintiffs prior to the 1953 change have been overpaid for two hours in which they were permitted to sleep, and after that date were overpaid, under the two-thirds rule for all of such pay received for time in which they slept.

Since this case is before us only on the question of liability, proof was not adduced to show the number of hours spent by each plaintiff in the various activities listed in finding 11. A good many of them were not performed during sleeping and eating time; others occupied only a negligible amount of time. Where a substantial amount of time was spent on these duties during eating and sleeping time, such as the desk watch, for instance, plaintiffs are to be compensated therefor, but where the time spent was negligible, it is to be disregarded, under the *de minimis* rule.

Against the total time spent on such duties during eating and sleeping time, defendant is entitled to an offset for the number of hours over eight in which plaintiffs were permitted to eat or sleep, but for which they have been paid, as well as for all overpayments of night differential pay.

A further claim is asserted for time spent in travel by boat to and from island fire stations. Plaintiffs say that the time consumed[3] by travel in boats furnished by the

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[2] Sec. 301, as amended by 60 Stat. 218, reads:

"Any officer or employee to whom this title applies who is assigned to a regularly scheduled tour of duty, any part of which, including overtime, falls between the hours of 6 o'clock postmeridian and 6 o'clock antemeridian, shall, for duty between such hours, excluding periods when he is in a leave status, be paid compensation at a rate 10 per centum in excess of his rate of basic compensation for duty between other hours."

[3] Four men were required to man the island fire stations during each tour. The boat trip required one-half hour each way. All plaintiffs are included in this claim, as all of them worked at each of the nine duty stations in rotation.

Navy is "employment" within the meaning of the Act. Section 201 reads in part as follows:

> Sec. 201. Officers and employees to whom this title applies shall, in addition to their basic compensation, be compensated for all hours of employment, officially ordered or approved, in excess of forty hours in any administrative workweek, at overtime rates as follows:
> • • •

Was the time spent in boat travel to and from their duty stations hours of employment?

Plaintiffs urge that the doctrine of *Tennessee Coal, Iron and Railroad Company* v. *Muscoda Local No. 123*, 321 U.S. 590, is controlling. We do not think this case is apposite. It was there decided that 'dangerous underground travel by iron miners to and from mine workings wholy within the mines, in cars furnished and operated by the mine owners and under their supervision and control, was compensable under the Fair Labor Standard Act.[4] The miners checked in at the opening to the mine on the surface of the ground; from there they were required by the owners to ride in ore cars or other cars to a platform about two miles from their place of work and to walk the rest of the way. This journey from the checking in place, all on the owner's property, was a necessary incident to their employment.

The facts of this case are quite different. The trip here was not exclusively on the owner's property; it was made before reporting for work; it was not required by defendant, although it was the only way they could get there, and it involved no more risk than the travel to and from work performed by any employee. The Supreme Court distinguished that case from a prior decision wherein pay was denied for travel by motorboat furnished by the em-

[4] 61 Stat. 84.

ployer to the work site.[5] We think the time spent in this travel is no more compensable than the time spent by any employee in going from his home to his work.

Finally, defendant asserts laches as a defense. We cannot sustain this contention for the reason that no showing has been made that defendant has been damaged by delay on the part of plaintiffs. Ordinarily, a plaintiff has the full statutory period within which to bring his action. Only an aggravated case of unreasonable delay, with notice of the damage being caused the defendant thereby, can deprive a plaintiff of the full statutory period within which to bring his suit. See *Poggas* v. *United States*, 118 C. Cls. 385, 410.

Defendant relies also on the Act of September 1, 1954 (68 Stat. 1111; 5 U. S. C. 926), which allows a lower rate of premium pay for employees such as firefighters, who are required to remain at their post of duty in a standby status. This Act has no application to plaintiffs by reason of subsection (b), which provides that it shall not decease the aggregate compensation of any employee then on the payroll.

Plaintiffs are entitled to recover, and judgment will be entered to that effect. We remand the case for further proceedings pursuant to Rule 38 (c), for determination of the amount due plaintiffs, if any, after appropriate offsets, as herein set out.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge,* and JONES, *Chief Judge,* concur.

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[5] *Butot, et al.* v. *Freeport Sulphur Co., Inc.*, 45 F. Supp. 380.

APPENDIX "B"

IN THE UNITED STATES COURT OF CLAIMS

No. 332-55

(Decided October 5, 1960)

WILLIAM AHEARN, ET AL. [CLAIMS OF FRANK F. McKAY (71) AND ARTHUR E. ST. LAURENT (65)] v. THE UNITED STATES

Claude L. Dawson and *Keith L. Seegmiller* for plaintiffs. *Irving Wilner* was on the briefs.

Kendall M. Barnes, with whom was *Assistant Attorney General George Cochran Doub*, for defendant. *Thomas J. Lydon* and *Cyril Moscow* were on the brief.

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

In *Gaetke* v. *United States*, 136 Ct. Cl. 756, this court was called upon to apply the Federal Employees Pay Act of 1945 (59 Stat. 295) to the unique situation of firefighters who were required to stay at their posts of duty on shifts of 24 hours continuously. The employees had entered into a contract with the Alaska Railroad whereunder they were paid for only 16 hours out of the 24, the other 8 hours being presumably devoted to sleeping and eating. But the employees, in derogation of their contract, sued, saying they were entitled to be paid for the full 24 hours under the Federal Employees Pay Act of 1945.

We upheld the contract, saying that we thought it was a reasonable application of the Act to their peculiar situation.

Then we were confronted with a case in which there was no contract. In that case we said that it was not reasonable to suppose that Congress, in passing the Federal Employees Pay Act of 1945, could have intended that an employee be paid while he was sleeping or eating. *Sawyer, et al.* v. *United States*, 138 Ct. Cl. 152.

We have reiterated this in many other cases, saying in all of them that we must give this Act a reasonable construction as applied to the unique situation of these men, and that it cannot be reasonable concluded that Congress intended to direct payment for hours spent in sleeping and eating.

We have never said that an employer was required to provide any specified amount of time for these purposes; all that we have said was, whatever the time fixed for eating and sleeping, an employee is not entitled to compensation for the time so spent. We have approved a division of the 24 hours into three equal parts, 8 hours work-time, 8 hours standby time, and 8 hours for eating and sleeping, but we have never said such a division was required.

The Civil Service Commission issued a regulation approving such a division of the 24 hours, and this has been followed by regulations in a number of departments; but, we repeat, all we have said is that an employee was not entitled to compensation for sleeping and eating time. We have never said he should be allotted 8 hours for sleeping and eating, no more and no less, and we say again that an employee is not entitled to compensation for the time allotted to him to eat and sleep.

In this case defendant at first allotted 8 hours for sleeping time, and an additional hour was spent in eating. Later, in 1953, defendant permitted 10 hours sleep, and an additional hour was spent in eating. The record does not show why this additional time was allowed, but it is plausible to suppose, in the light of the facts of this case, that it

was done to permit the employees to "catch up on their sleep" where it had been interrupted on previous nights by calls to active duty.

For all of this extra sleeping time plaintiffs have been compensated. Defendant says this is an overpayment, under our decisions, since it was payment for time allotted to sleeping and eating. It seeks to deduct it from any amount found to be due plaintiffs for work done during eating and sleeping time. We think defendant's position is correct.

This case was tried only as to the claims of Frank F. McKay and Arthur E. St. Laurent. The Trial Commissioner found that McKay had spent a total, over the 9-year period, of 2,510 hours of duty during his sleeping period, and St. Laurent, 2,233 hours. For this they are entitled to compensation. On the other hand, the Trial Commissioner found they have been paid compensation for hours allotted to sleeping and eating amounting to 3,750 hours, in the case of McKay, and to 3,752 hours, in the case of St, Laurent.

In stating an account in all debtor-creditor relationships, of course, an overpayment on one transaction is to be offset against an underpayment on another. So, the sum of all payments erroneously made for hours allotted to sleeping and eating must be subtracted from payments due for work performed during the time set apart for sleeping and eating. It turns out that the amounts erroneously paid for eating and sleeping time exceed the amounts due for work performed during sleeping and eating time and, therefore, plaintiffs McKay and St. Laurent are not entitled to recover.

Defendant has abandoned its counterclaim for the excess of the overpayment for time allowed for sleeping and eating, but does ask for the excess night differential paid. This excess night differential seems to have arisen in this

way: In attempting to apply to this case the so-called "two-thirds" rule, defendant credited the employee for pay purposes with two-thirds of an hour for each hour of the 24. This, of course, included the hours set apart for sleep. So long as the hours so set apart were one-third of the total of 24, this formula produced the correct result, but when 10 hours were set apart for this purpose, the formula resulted in an excess payment of night differential. The amounts in controversy on this account are $804.68 in the case of McKay, and $784.36 in the case of St. Laurent.

According to the strict letter of the law, as interpreted by this court, defendant is entitled to recover these amounts, but, under all the circumstances, we think it is inequitable that it should do so. Until our decision in the *Gaetke* case, *supra*, the parties were uncertain as to their rights: the employees were demanding pay for standby time, including time spent in eating and sleeping, but defendant at first declined to pay for any standby time, but later agreed, at least in some instances, to pay for standby time, except that spent in sleeping and eating. Customarily, this resulted in payment for 16 hours out of the 24. This custom of paying for 16 hours out of the 24 was followed although, in the case at bar, sleeping time was increased to 10 hours in August 1951. Between this date and May 12, 1958, when defendant filed its counterclaim, no claim of an overpayment on account of payment for time allotted to sleeping and eating or of overpayment of night differential was ever made, and probably no such claim would ever have been made except for the claims plaintiffs made for payment for the full 24 hours.

Defendant's failure to make such a claim does not amount to a waiver of it, but we think the ends of justice will be met if we leave the parties in the *statu quo ante* the litigation, denying plaintiffs' claims for pay for sleeping and eating time, except that spent in labor, and using

the overpayments by defendant to do no more than offset this time. This, it seems to us, was defendant's purpose of allowing the additional time for sleeping anyway, as compensation for labor required during sleeping time.

We think defendant recognizes the justice of this conclusion when it abandons its claim to recover amounts paid for time allotted to sleeping. In principle we see no difference between its right to recover such amounts and its rights to recover for overpayment of night differential.

Dismissal of the claims of plaintiffs McKay and St. Laurent and defendant's counterclaims seems to us to meet the ends of justice, and, therefore, they will be dismissed.

It is so ordered.

DURFEE, *Judge*; LARAMORE, *Judge*; MADDEN, *Judge*, and JONES, *Chief Judge*, concur.

APPENDIX "C"

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS
WASHINGTON 25, D. C.

Office of the
Administrator

Dec. 30, 1958

Mr. Irving Wilner
Seegmiller, Wilner and Custer
Law Offices
1616 Eye Street, N. W.
Washington 6, D. C.

Dear Mr. Wilner:

In your letter of December 10, 1958, you ask several questions concerning the term "5 hours' sleep" used in section 785.3(e)(2) of the interpretative bulletin on hours worked.

Under the enforcement position set forth in this section of the bulletin, if an employee who is required to be on duty for 24 hours or more cannot get at least 5 consecutive hours of uninterrupted sleep during the scheduled sleeping period, the entire time scheduled for sleeping must be counted as hours worked. The policy that "5 hours' sleep" constitutes "a reasonable nights' sleep" was based upon practical considerations. This enforcement position has been in effect for many years and constitutes the official position of the Wage and Hour and Public Contracts Divisions insofar as its administrative and enforcement responsibilities under the Fair Labor Standards Act are concerned.

As you were informed by a member of my staff at the time you recently visited our offices, we cannot, for obvious reasons, disclose the names of individual cases where we

have applied the foregoing position. The position has, however, been consistently applied in all types of establishments where employees, such as firemen, guards, watchmen, and other employees are required to be on duty for 24 hours or more.

Very truly yours,

/s/ Clarence T. Lundquist
Administrator

APPENDIX "D"

U. S. DEPARTMENT OF LABOR
WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS
WASHINGTON 25, D. C.

Office of the
Administrator

Oct. 27, 1960

Mr. Irving Wilner
Seegmiller, Wilner and Custer.
Premier Building
1725 Eye Street, N. W.
Washington 6, D. C.

Dear Mr. Wilner:

This is in reply to your letter of October 14, 1960.

As stated in Section 785.3(c)(2) of the Interpretative Bulletin on Hours Worked from which you quote in your letter, bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours may be excluded from hours worked. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. Unless the employee can get at least 5 hours of sleep during the scheduled sleeping period, the entire time is working time.

It is not permissible to offset sleeping time from one tour of duty to another since no more than 8 hours of sleeping time in a given tour can be excluded from hours worked.

If you have further questions concerning this matter, or if we can be of further service to you, do not hesitate to contact this office.

Very truly yours,

/s/ Duane A. Wendale
Acting Administrator